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Supreme Court of the United States

OCTOBER TERM, 1946

Nos. 609, 610 and 612

CHARLES A. DANA, SIR JAMES DUNN, JOHN W. HUBBARD and NEWCOMBE C. BAKER, as a Common Stockholders Committee, Equitable Office Building Corporation,

Petitioners,

v.

J. DONALD DUNCAN, as Trustee, et. al.,

Respondents.

No. 609

In the Matter

of

EQUITABLE OFFICE BUILDING CORPORATION (name changed to "Equitable Office Building 1913 Co., Inc."),

Debtor,

EQUITABLE OFFICE BUILDING 1913 CO., INC.,

Petitioner,

J. DONALD DUNCAN, as Trustee, et. al.,

Respondents.

No. 610

ADELAIDE H. KNIGHT and WILLIAM P. DOYLE, Common Stockholders of the Equitable Office Building Corporation, Debtor,

Petitioners,

v.

J. DONALD DUNCAN, as Trustee, et. al.,

Respondents.

No. 612

BRIEF OF DEBENTURE HOLDERS IN OPPOSITION TO PETITIONS FOR CERTIORARI.

This brief is filed on behalf of holders of the debtor's 35 Year 5% Sinking Fund Debentures in opposition to the petitions for certiorari filed

(a) by Charles A. Dana, et al., as a Common Stockholders' Committee (No. 609);

(b) by the debtor, Equitable Office Building Corporation (No. 610); and

(c) by Adelaide H. Knight and William P. Doyle, alleged stockholders (No. 612).

As these cases arise from identical facts and present the same principal questions, respondents, in the interests of expedition, respectfully request permission to file this single answering brief.

Opinions Below

The District Judge filed a memorandum opinion on July 16, 1946 (R. 99) relating specifically to his denial of the petitions by Adelaide H. Knight and William P. Doyle (No. 612), but he indicated in denying the applications of the other petitioners (Nos. 609 and 610) that he was actuated by the same reasoning. (R. 138, 142, 346).

The Circuit Court of Appeals for the Second Circuit filed no written opinion when it denied the applications of petitioners for a stay pending determination of the appeals in that Court.

Jurisdiction

Petitioners in all these applications (Nos. 609, 610 and 612) apply for writs of certiorari, under Section 240(a) (28 U.S.C. §347) and alternatively under Section 262 (28 U.S.C. §377) of the Judicial Code, to review orders of the United States Circuit Court of Appeals for the Second Circuit denying applications for a stay of consummation

of a confirmed plan in this proceeding under Chapter X of the Bankruptcy Act, pending a determination of the merits of appeals to said Circuit Court.

Petitioners in No. 609 also apply for a writ of certiorari to review, under Section 240(a), an order of the United States *District Court* denying their application for an *order to show cause* why the proceedings should not be dismissed, which order is now on appeal in the United States Circuit Court of Appeals for the Second Circuit.

Petitioner in No. 610 also applies for a writ of certiorari to review, under Section 240(a) of the Judicial Code (28 U.S.C. §347), an order of the United States *District Court* denying debtor's application for an order vacating the order of confirmation of plan and dismissing the proceedings under Chapter X of the Bankruptcy Act, which order is now on appeal in the United States Circuit Court of Appeals for the Second Circuit.

Jurisdictional Question Presented

Respondents respectfully call to this Court's attention that Section 240(a) of the Judicial Code, in so far as it grants to the Supreme Court power "to require by certiorari . . . *before* . . . a judgment or decree" by the Circuit Court of Appeals "that the cause be certified to the Supreme Court for determination", does not apply to proceedings under the Bankruptcy Act.

The jurisdiction of this Court in bankruptcy proceedings is set forth in Section 24 of the Bankruptcy Act, which is entitled "Jurisdiction of Appellate Courts":

> "c. The Supreme Court of the United States is hereby vested with jurisdiction to review judgments, decrees, and orders of the Circuit Courts of Appeals of the United States and the United States Circuit Court of Appeals for the District of Columbia in proceedings under this Act in accordance with the pro-

> visions of the laws of the United States now in force or such as may hereafter be enacted."

No jurisdiction is granted to review judgments, decrees, and orders of the *District Court*. No jurisdiction is conferred, *prior* to the entry of a judgment, decree or order therein, to cause proceedings pending in the Circuit Court of Appeals to "be certified to the Supreme Court for determination".

No judgment, decree, or order of the Circuit Court of Appeals has been entered on the merits of petitioners' appeals from the orders of the District Court.

Section 24(c) of the Bankruptcy Act, which is expressly made applicable to proceedings under Chapter X by Section 121 of the Bankruptcy Act, was enacted in 1938; the last amendment of Section 240(a) of the Judicial Code was enacted in 1925. It is significant that prior to the enactment of Section 24(c) of the Bankruptcy Act in 1938, the language of the statute conferred broader power upon the Supreme Court. Former Section 24(a) of the Bankruptcy Act read:

> "The Supreme Court of the United States . . . in vacation, in chambers and during their respective terms, as now or as they may be hereafter held, are hereby invested with appellate jurisdiction of controversies arising in bankruptcy proceedings from the courts of bankruptcy from which they have appellate jurisdiction in other cases."

Respondents therefore request this Court to dismiss the applications in Nos. 609 and 610 for writs of certiorari to review orders of the United States District Court.

If this Court should overrule the foregoing contention of Respondents, they respectfully ask the Court in the exercise of its discretion to dismiss or deny the writs upon the other grounds hereinafter set forth.

Questions Presented

A. As to Nos. 609, 610 and 612:

1. Did the Circuit Court of Appeals for the Second Circuit abuse its discretion—after hearing a discussion on the facts and on the effect upon this proceeding if the stay were granted—in denying an injunction to restrain consummation of a confirmed plan when collateral attacks upon it had been overruled by the District Court and appeals from the rulings were pending in said Circuit Court of Appeals? (See Point I, *infra*, p. 9.)

B. As to No. 609:

2. Does an appeal lie from a denial by the District Court of an application for an *order to show cause*? (See Point II, *infra*, p. 10.)

C. As to No. 610:

3. Is a motion for a vacation of an order confirming a plan in the nature of a motion for a rehearing, when the motion is not based on mistake, gross inequity, fraud, or similar grounds, and if there is no allegation that the confirmed plan is not fair and equitable, or feasible? If so, is a denial of such a motion appealable? (See Point III, *infra*, p. 11.)

D. As to Nos. 609 and 610:

4. Where a proceeding under Chapter X of the Bankruptcy Act has been initiated by the filing of a petition under Section 128, may the court dismiss the proceeding without a hearing upon notice to the debtor, stockholders, creditors and other interested parties? (See Point IV, *infra*, p. 12.)

The following question is reached in No. 609 if questions 2 and 4 are answered in the affirmative, and is reached

in No. 610 if questions 3 and 4 are answered in the affirmative:

5. Did the bankruptcy court, in a proceeding under Chapter X, abuse its discretion in refusing to grant motions of stockholders and the debtor to vacate an order confirming a plan, when: the confirmed plan was concededly "fair and equitable" and "feasible"; the confirmed plan was based upon the sound economic value of the debtor's assets; no change in the economic value of the assets had occurred after confirmation of the plan; all interested parties who had appeared in the proceeding had approved confirmation; all classes of creditors and stockholders had overwhelmingly voted in favor of the plan; of those qualified to vote, 84% of the stockholders, 99% of the debenture holders, and 100% of the Gold Mortgage bondholders, had voted in favor of it; the time to appeal from the order of confirmation had expired and no appeal had been taken; there was no claim of mistake, gross inequity, important change in economic conditions, or fraud; and petitioners applied for a vacation of the order of confirmation solely in the hope that through the medium of a new plan they might get some advantage from a temporary, inflated, "when issued", price per share, in July 1946, in a thin and highly speculative "over the counter" market, which was in excess of the sound economic value of such shares, as fixed in the reorganization proceeding?[1] (See Point V, *infra*, p. 12).

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[1] The price of the shares has recently dropped to approximately $7.50 to $8.50 per share. Allowing for the difference in the value of the assets of the debtor under the respective plans, these prices would roughly be equivalent to $6.50 to $7.50 for the shares under the proposed new plan. The sound economic value of the shares is $6. The value at which they are allotted to the old debenture holders under the confirmed plan is $6.50.

Facts

The facts are concisely stated when needed in the argument of this brief.

Statutes Involved

The pertinent provisions of statutes involved in this case are set forth in the Appendix, *infra*, p. 30.

Summary of Argument

In denying the "stay", the Circuit Court of Appeals acted in the reasonable exercise of its discretion after a full hearing on the facts and on the effect which a grant of the stay would have on the pending proceeding. The "stay" requested was in essence an injunction against enforcement of a court order which was being attacked collaterally, and not by direct appeal. Since innumerable collateral attacks may be made on any order, courts are reluctant to suspend proceedings because of such collateral attacks.

Appeal does not lie from refusal to sign an order to show cause.

An application to vacate an order confirming a plan, —when the application is not based on mistake, gross inequity, fraud or similar grounds, or on the ground that the plan is not fair and equitable or not feasible, but merely on the ground that some stockholders may benefit from the substitution of a new plan for one which is concededly fair and equitable and feasible—is in the nature of an application for a rehearing on the order of confirmation. Denial of an application for a rehearing is not appealable.

Notice of a hearing on an application for the dismissal of a proceeding under Chapter X must be given to all creditors and stockholders. Such notice was not given by petitioners.

Petitioners' applications either:

(a) seek a "modification or amendment" of the plan pursuant to Section 222 of the Bankruptcy Act; or

(b) seek a reopening of the proceeding and a rehearing of the order of confirmation.

If regarded as proposed amendments under Section 222, they were properly denied as attempting to substitute a new plan under the guise of an amendment of a plan approved, accepted, confirmed, and partially consummated.

If considered as applications to reopen the proceeding and for a rehearing, they were properly denied because they contain no allegation of fraud, a major change in economic conditions, surprise, or other facts warranting such relief.

But whether considered as an amendment under Section 222, or an application for a rehearing under the general equity powers of the court, they were in either event addressed to the discretion of the court.

There was no abuse of discretion in denying the applications. The confirmed plan is fair and equitable and is based on a valuation of the debtor's assets which is concededly correct. The proposed modified or new plan is without merit, and is not feasible; there is no assurance that it could be put into effect if substituted for the confirmed plan.

The proposal of petitioners involves the substitution of a new plan for the confirmed plan. It does not involve payment by a debtor of its debts.

The action of the District Court in refusing to set aside the confirmed plan has been vindicated by subsequent events. The underwriter originally produced has refused to continue its offer because of a change in market conditions. No other offer of underwriting has been substituted.

The questions herein are either of minor importance, or have been settled by judicial decision, or involve conclusions to be drawn from the peculiar facts of this case. No important question of law will be settled by a review of this case by this Court. There is no conflict among the decisions of the courts.

POINT I

The Circuit Court did not abuse its discretion in denying the injunction.

The "stay" which was requested was in reality an *injunction* to prevent the consummation of a plan approved and confirmed by concededly valid orders consented to by all the parties and not opposed by any, from which orders no appeals had been taken. Final adjudication, upon appeal, that the several collateral attacks now pending have no merit, will not prevent other attacks and other applications for similar injunctions. Endless delay in the consummation of this reorganization, to the detriment of all interested parties, would occur if injunctions against consummation of the plan were issued whenever a non-meritorious application is denied and an appeal is taken.

The courts show much greater reluctance in issuing *injunctions*, which are collateral to appeals, than in issuing *stays* of orders or judgments which are themselves the subject of the appeals. A *stay* may be secured almost as a matter of course through the statutory procedure for *supersedeas*. *Injunction* is an extraordinary remedy granted only under unusual circumstances. *State Corp. Comm'n* v. *Wichita Gas Co.*, 290 U. S. 561, 568 (1934); *Harrisonville* v. *Dickey Clay Mfg. Co.*, 289 U. S. 334, 337-8 (1933); *Hunnewall* v. *Cass County*, 22 Wall. 464, 478 (1875).

The Circuit Court refused the injunction after a hearing at which the parties were given an opportunity to be heard both on the facts and on the effect of an injunction on the pending proceedings. In the absence of a clear showing of an abuse of discretion, its refusal to grant the "stay" should not be reviewed by this Court. *Hovey* v. *McDonald*, 109 U. S. 150, 161 (1883); *In re Lesser*, 99 Fed. 913, 914 (C.C.A. 2d, 1900); 2 Collier on Bankruptcy (14th ed. 1940), pars. 24.39, 24.40.

Writs are requested from denials of "stays" in each of Nos. 609, 610 and 612.

POINT II

An appeal does not lie from a refusal to sign an order to show cause.

In No. 609, the Stockholders' Committee petitions for a writ of certiorari "to review the order of the District Court . . . denying petitioners' application for an *order to show cause*" (emphasis supplied).

An order denying a petition for an order to show cause only denies one means prescribed by law for bringing on a matter for hearing; it is an administrative order and is not appealable. *Morehouse* v. *Pac. Hardware & Steel Co.*, 177 Fed. 337 (C.C.A. 9th, 1910); *cf., Fed. Power Com'n.* v. *Met. Edison Co.*, 304 U. S. 375, 383-4 (1938); see 2 *Collier, Bankruptcy* (14th ed. 1940) Par. 24.39.

Petitioners could have brought their motion on for hearing by a notice of motion.

POINT III

The motion to vacate the order of confirmation was in effect a motion for a rehearing. An order denying a rehearing is not appealable.

While it is clear by the decisions of this Court that the District Court has power to grant motions for rehearings out of term, it is equally clear that neither a refusal to entertain such a motion, nor a denial of such a motion, if entertained, is appealable. *Wayne Gas Co.* v. *Owens-Ill. Glass Co.*, 300 U. S. 131, 137 (1937); *Pfister* v. *Northern Ill. Finance Corp.*, 317 U. S. 144, 149-50 (1942); *Conboy* v. *First Nat. Bank*, 203 U. S. 141, 145 (1906).

The same rule applies to motions to reopen, *Wragg* v. *Fed. Land Bank*, 317 U. S. 325, 327 (1943); motions to modify, *Old Colony Tr. Co.* v. *Kurn*, 138 F. (2d) 394, 395 (C.C.A. 8th, 1943); motions to vacate, *Brown* v. *Thompson*, 150 F. (2d) 171, 172 (C.C.A. 8th, 1945); and all like motions, however denominated.

The motions for a vacation of the order of confirmation were not based upon alleged mistake, gross inequity, fraud, or similar grounds; nor were said motions based on any allegation that the confirmed plan is not fair and equitable or not feasible. A new plan is desired merely because petitioners believe such new plan may afford *some* additional benefits to *some* stockholders.

Such motions are clearly in the nature of motions for a rehearing on confirmation of the plan. As such, denial thereof is not appealable.

POINT IV

The District Court had no power to dismiss the proceeding without a hearing upon notice to all creditors, stockholders, etc.

In No. 609, petitioners apply for a writ to review the order of the District Court denying an order to show cause bringing on for hearing their application for an order dismissing the proceedings under Chapter X (Stockholders' Committee petition, p. 3).

In No. 610, the petitioner applies for a writ to review an order of the District Court denying its application for an order dismissing the proceeding (Debtor's petition, p. 3).

When the Chapter X proceeding was initiated no bankruptcy proceeding was pending. The petition initiating the proceeding was, therefore, filed under Section 128 of the Bankruptcy Act.

The petition having been filed under Section 128, the Court may dismiss the proceeding only after a hearing upon notice to the Debtor, and all stockholders, creditors and other interested parties (Bankruptcy Act, Sec. 236[2]).

The petitioners did not bring on their motions upon such notice.

POINT V

The District Court did not abuse its discretion in denying the applications to vacate its order of confirmation.

A. An order confirming a plan should not be vacated except upon the most compelling grounds:

Under Section 222 of the Bankruptcy Act the District Court may approve "alterations" or "modifications" of a plan In the exercise of this power, however, the Court

should not approve a completely new plan — as petitioners propose in this case. *In Re Diversey Bldg. Corp.*, 141 F. (2d) 65, 69 (C.C.A. 7th, 1944); *Country Life Apts.* v. *Buckley*, 145 F. (2d) 935, 937 (C.C.A. 2d, 1944); *Rogers* v. *Consolidated Rock Products Co.*, 114 F. (2d) 108, 111 (C.C.A. 9th, 1940); *Downtown Inv. Ass'n.* v. *Boston Metropolitan Bldgs.*, 81 F. (2d) 314, 321 (C.C.A. 1st, 1936).

The bankruptcy court, as a court of equity, also has power to revoke or modify its orders confirming or directing consummation of a reorganization plan, but such action will not and should not be taken except in unusual circumstances and upon a showing of compelling grounds such as fraud, mistake in fact, or a wholly unenvisaged change in the value of the Debtor's assets. *R. F. C.* v. *Denver & R. G. W.*, 90 L. ed. 1134, 1148 (1946); Rule 60, *Federal Rules of Civil Procedure*; *Graffam* v. *Burgess*, 117 U. S. 180, 191-2 (1886); *In re Burr Mfg. & Supply Co.*, 217 Fed. 16 (C.C.A 2d, 1914); *In Re Burton Coal Co.*, 57 F. Supp. 361, 364 (N.D. Ill. 1944); *Mohonk Realty Corp.* v. *Wise Shoe Stores*, 111 F. (2d) 287, 289 (C.C.A. 2d, 1940), *cert. denied*, 311 U. S. 654 (1941). No such grounds were alleged by petitioners.

Under the terms of Section 224, the order of confirmation destroys all the former rights of creditors and stockholders and vests in them such new rights as are granted to them under the confirmed plan. Upon confirmation, all questions which could have been raised appertaining thereto become *res judicata*. S. Rep. No. 1916 on H. R. 8046, 75th Cong., 3d Sess. (1938) 36; *Prudence Realization Corp.* v. *Ferris*, 323 U. S. 650, 654-5 (1945); *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371, 375, 378 (1940); *Stoll* v. *Gottlieb*, 305 U. S. 165, 172-7 (1938). The plan is then conclusive, in the absence of the utmost urgency, upon every claimant and stockholder, even though some of them failed to file proofs of claim or interest, or

to appear in the proceeding. *Prudence, Chicot County,* and *Stoll* cases, *supra; North American Car Corp.* v. *Peerless W. & V. Machine Corp.*, 143 F. (2d) 938 (C.C.A. 2d, 1944).

B. An order of confirmation is not merely "a step in the process of the administration of the Debtor's estate" but it vests rights in the creditors and stockholders:

Respondents contend that the order of confirmation vests rights in the creditors and stockholders which can be divested only through a proper application to "alter or modify" a plan under Section 222, or through the exercise by the court of its inherent power as a court of equity to set aside its order because of gross inequity, important change in economic situation, mistake or fraud.

The contention of petitioners is that rights are not vested until there has been a "consummation" of the plan. They give no effect to an order of confirmation.

The contention of the petitioners does not conform to the pattern of the statute. The procedure contemplated by the Act is as follows:

Under Section 224, upon confirmation the plan and its provisions become binding upon the debtor and all creditors and stockholders, whether or not they have filed proofs of claim or interest. The old rights of creditors and stockholders are taken away, and new rights substituted. The section also obligates the debtor and all other persons to comply with the provisions of the plan and all orders which the court may make relative thereto, and directs that distribution "shall be made in accordance with the provisions of the plan to creditors and stockholders".

Section 226 provides that after confirmation of the plan the properties shall be transferred by the trustee to the debtor or to the corporation provided for in the plan, and when transferred shall be free and clear of all claims and interest of the debtor and its creditors and stockholders,

except as otherwise provided in the plan or the order confirming the plan. This section deals with legal title and determines that title to the property of the debtor passes from the trustee to the reorganized debtor or to the new corporation upon its transfer by the trustee.

Section 227 gives the court power to compel the debtor, the trustee, any mortgagees, indenture trustees or other necessary parties to execute and deliver any and all instruments necessary to consummate the confirmed plan.

Section 228 provides that upon full consummation of the plan the judge shall enter a final decree discharging the debtor and the trustee and closing the estate. It is clear that this final decree is in the nature of a decree settling the accounts of the trustee or debtor in possession and granting them a discharge upon a satisfactory showing that they have done everything necessary to consummate the confirmed plan and have satisfactorily accounted for their acts.

If a plan were, as argued by petitioners, to become effective only upon "consummation" of a plan, confusion and chaos would exist during the period between confirmation of the plan and entry of the final decree. Innumerable steps, in series, must be taken in consummation of a plan after entry of the order of confirmation and before the final decree can be entered. There is no instant of time and no particular act which can be pointed to as the precise point at which a plan has been "consummated". Is the plan "consummated" when the first transfer of assets occurs, or when a majority of such assets are transferred, or when all the assets have been transferred? If the answer be that transfer of a majority or all of the assets is necessary, is no effect to be given to the transfer of less than a majority? What about all the other steps which must be taken in consummation? Are *none* effective until *all* have been taken? If effective before completion of *all* the

steps, what particular steps are necessary to constitute consummation?

Orderly procedure clearly demands that the order of confirmation be given effect as vesting rights, that the acts of consummation be considered as performance of the various acts necessary to give legal evidence of the transfer of the rights vested by the order of confirmation, and that the final decree be given effect as evidence of a proper accounting by the debtor and Trustee, as an approval of their accounts, as an order discharging them from further liability, and as an order closing the estate.

Respondents do not contend that rights vested by an order of confirmation may never be disturbed. They concede that there may be a divestment of such rights by "alterations or modifications" of a plan, in a proper case, under Section 222 of the Bankruptcy Act, or where there is a showing of gross inequity, important change in economic situation, mistake or fraud. The facts alleged in the petitions do not bring this case within any of these categories.

C. The proposals of petitioners are not offers of the debtor to pay its debts:

The plan which is sought to be modified was confirmed by order of the court dated May 13, 1946. Under the provisions of Section 224 of the Bankruptcy Act, "upon confirmation of a plan, the plan and its provisions shall be binding . . . upon all creditors and stockholders". Confirmation of the plan, therefore, substituted new vested rights and obligations for those previously represented by the old claims and stock of the debtor. Debenture holders lost their right to receive $5,942,500 (principal and interest to November 1, 1946) in cash. Substituted for it was a right to receive $2,852,400 in new debenture bonds and 475,400 shares of the new common stock. Petitioners now

propose that these new vested rights shall be taken away by a proposed new plan. They do not offer to satisfy these new rights.

In any event, this is not a case of a debtor coming into court with funds for the payment of its debts. What is involved is an intricate proposal to recapitalize the debtor and to offer stock for subscription by stockholders, the unsubscribed stock to be underwritten. The petitioners propose that the reorganization proceeding shall be dismissed only *after* the recapitalization and financing have been effected. Therefore, the proposal involves a new plan of reorganization, and would require a reopening of the proceedings *de novo* and compliance with all of the statutory safeguards afforded by Chapter X with respect to plans, including submission to and approval by the security holders.

Milwaukee & Minnesota R. R. Co. v. *Soutter,* 69 U. S. 510 (1864) is not in point. It merely held that when a foreclosure decree expressly provided that a sale was not to be held until after the expiration of one year, the owner could pay the indebtedness before the expiration of such year.

In *In Re Deep Rock Oil Corp.,* 113 F. (2d) 266, 269 (C.C.A. 10th, 1940), the court held that if the assets of a debtor "*should so increase in value* that there would be a substantial equity" for stockholders, "the Court under its broad equitable powers would have power to prescribe a modification of the plan to make available this equity" to them. The court held the Deep Rock Oil Corporation's assets had not increased. In the instant case, there was neither alleged nor proven any increase in the value of the debtor's property.

Wright v. *Union Central Life Ins. Co.,* 311 U. S. 273 (1940), merely holds that under the express provisions of Section 75(s)(3) of the Bankruptcy Act, a farmer-debtor

is entitled to an opportunity to redeem his property "before sold at public auction".

The brief filed on behalf of the debtor quotes *Gerdes, Corporate Reorganizations,* Section 1153, to the effect that dismissal of a reorganization proceeding "may also be equitable where the debtor has, during the proceeding, become solvent and liquid enough to pay all of its debts as they mature". The context from which this statement was taken makes it clear that it refers to a dismissal prior to the proposal, acceptance, or confirmation of a plan of reorganization, and not after a plan has been accepted and confirmed. See 3 *Gerdes, Corporate Reorganizations,* Section 1135, where the following statement is made: "The climax of any proceeding instituted under Section 77B is the judge's confirmation of the plan of reorganization. Once the plan is confirmed, nothing remains to be done except the ministerial tasks required to execute and consummate the plan physically".

D. The District Court properly denied the applications in the exercise of a sound discretion:

The District Court held that it had power to grant the petitions.[1a] It therefore denied said petitions in the exercise of its discretion.

When the District Court exercised its discretion, it did so with knowledge of the following facts:

(a) The confirmed plan was "fair and equitable" and "feasible";

[1a] At one of the hearings on these petitions, the Court said (R. 66): "Whether it [Section 222 of the Bankruptcy Act] authorizes it or not, I can do it. I have no doubt about it, but the thing I am asking you as trustee is whether you think I should." (Material in brackets has been supplied.)

At another hearing, the Court said (R. 32): "I know I have the power".

(b) The confirmed plan was based on a valuation of the debtor's assets which gave due weight to the abnormally high profits which might reasonably be expected in the near future;[2]

(c) There had been no unanticipated increase in the value of the debtor's assets after their valuation by the Court;[3]

(d) All of the parties who had appeared of record in the proceedings had consented to the confirmed plan or had acquiesced in its confirmation, no appeals had been taken from the order of confirmation, and the time to take appeals had expired (R. 26, 53-4);

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[2] Petitioners do not claim error in the valuation of the debtor's property. Three well qualified real estate experts testified. One, retained by the Trustee, estimated a normal future net income applicable to interest and amortization of $1,322,500, and a building value of approximately $20,000,000; another, called in behalf of the debenture holders, estimated that the normal future net income available for interest and amortization would be $1,295,000, and that the building had a value of approximately $20,000,000; and the third, testifying for the Common Stockholders' Committee, estimated the normal future net income applicable to interest and amortization would be $1,355,000, and appraised the building at approximately $23,500,000 (R. 324). The Court fixed the value of the building at $21,375,000 (R. 177). The only criticism of the Court's valuation was that it was *too high*—too favorable to stockholders. This was the view of the Securities and Exchange Commission (R. 322).

[3] Not only is there no allegation in the petitions of any change in the value of the debtor's property since the orders of approval and confirmation, but no such change has in fact occurred. The estimated income for the fiscal year ending April 30, 1946, used in the valuation of the debtor's property, was $120,000 *greater than the actual net income* subsequently realized for that fiscal year as shown by the auditor's report (R. 324), although the percentage of occupancy of the building during the fiscal year 1946 was the highest since 1938, and was substantially in excess of the estimated average future occupancy percentage used by the experts in determining the value of the property (R. 324).

(e) The debentureholders who had qualified to vote on the plan by filing claims had accepted the confirmed plan by a vote of 99% in favor, 1% opposed, and the stockholders so qualified had accepted the plan by a vote of 85% in favor, 15% opposed (R. 243);

(f) The proposed new plan would jeopardize the debtor's cash reserve for future contingencies;[4]

(g) The proposed new plan would be of doubtful benefit to stockholders who could and would subscribe for additional shares at $6 per share,[5] and would definitely injure stockholders who either could not or would not subscribe for such shares,[6]

(h) The underwriting agreement which is an inherent and necessary part of the proposed new plan would not

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[4] The proposed new plan provides for the retirement of the old debenture bonds by payment in full, principal and accrued interest, in cash. The cash required for this purpose, even if payment could have been made as early as November 1, 1946, would have been $5,942,500. Of this amount, it was proposed to raise $5,172,588 by giving old stockholders a right to subscribe, at $6 per share, for 862,098 shares of the new stock of the debtor; the balance of $769,912 would have been taken from the treasury of the debtor. The District Judge expressed great concern over this proposed use of the debtor's cash (R. 68, 98).

[5] On the basis of the value of the debtor's property fixed by the experts and the Court—which value is not questioned by these appellants—each of the new shares has a value of slightly *less* than $6, the amount which stockholders would be compelled to pay for each of their additional shares.

[6] Stockholders who fail to subscribe for the new shares would receive the same number of shares under both plans; *but* the value of the equity represented by the entire issue of new common stock would be $769,912 *less* under the proposed new plan since this amount of cash would be taken from the coffers of the debtor to make up the difference between the payment to be made to retire the old debentures and the amount which would be receivable on stock subscriptions at $6 per share.

be binding upon the underwriter, although an unconscionable fee would be paid under it to the underwriter;[7]

(i) Even if the underwriter were voluntarily to purchase shares under the terms of the underwriting agreement, the price to be paid by it would be considerably less per share than will be received for such shares, under the confirmed plan, from the debenture holders;[8]

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[7] Under the so-called underwriting agreement the underwriter would not have been required to purchase any of the shares (R. 107, 156, 134) unless, *prior to October 15, 1946*, the proposed new plan had been finally confirmed, it had been carried out by the transfer and conveyance to a new company of all the assets and properties, all rights of appeal from orders confirming or relating to the consummation of the plan had expired, all appeals taken had been finally disposed of, the new stock had been offered to the old stockholders and not subscribed for, and there had been delivered to the underwriter the unsubscribed shares which it would have been required to purchase.

Even with the consent of all the interested parties, there was no possibility of performing these conditions within the time fixed. The underwriter was informed of this by the court, the Commission and the parties, but refused to extend the time. (R. 66, 67.)

The same criticism of impossibility of meeting the conditions applies to the offer of the underwriter to purchase up to $5,200,000 of Trustee's Certificates, which offer specifies that the certificates should become due *October 15, 1946*, (R. 109-110; 134; 158).

For its agreement, although unenforceable, the underwriter was to receive a fee of 69,686 shares of the debtor's stock (R. 107, 134, 155).

The action of the District Court in refusing to set aside the confirmed plan has been vindicated by subsequent events. The underwriter originally produced has refused to continue his offer because of a change in market conditions. No other offer of underwriting has been substituted.

[8] If no stockholder subscribes for additional shares, the underwriter will be entitled to 931,784 shares for a total payment of $5,172,588—$5.55 per share; if stockholders subscribe for 50% of the shares, the underwriter will receive 500,735 shares for $2,586,294—$5.15 per share; if stockholders subscribe for 80% of the shares, the underwriter will receive 242,106 shares for $1,034,518—$4.27 per share; if stockholders subscribe for 90% of the shares, the underwriter will receive 155,896 shares for $517,258.80—$3.31 per share; and if stockholders subscribe for

(j) There was no assurance that the proposed new plan would be accepted by the necessary vote of the stockholders, or that it could be consummated if so approved;

(k) No fraud, mistake, gross inequity, or similar ground for vacating the previous orders of approval and confirmation was alleged, or proven; and

(l) A reopening of all proceedings on the plan in order to consider the proposed new plan would delay consummation of the reorganization proceedings for at least six months—more likely, at least a year—and saddle the debtor's estate with thousands of dollars of additional expense.

As opposed to the foregoing reasons for denying the petitions, petitioners advanced only one reason for granting them: In a highly speculative[9] "over the counter", "when issued", market, the proposed new shares were

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95% of the shares, the underwriter will receive 112,791 shares for $258,629.40—$2.28 per share. If stockholders subscribe for more than 95% of the shares, the price to the underwriter will be less than $2.28 per share.

Under the confirmed plan, the old debenture holders receive, for their claim of $5,942,500 (as of November 1, 1946), $2,852,400 of new convertible debentures (convertible into 16 shares per $100 during the first three years, and 10 shares per $100 for two years thereafter) and 475,400 shares of stock. They therefore receive 475,400 shares for the cancellation of $3,090,100 of their claims—equivalent to $6.50 per share—and conversion privileges at the rates of $6.25 and $10 per share.

[9] That there is a direct connection between the filing of these petitions and market speculations in the debtor's shares was revealed by the Securities and Exchange Commission at the hearing before the District Court (R. 71-73). Mr. Berner, attorney for one of the petitioners, *before* publicly announcing or filing his present attack on the confirmed plan, advised his brother-in-law to buy shares of the debtor. At the opening of the market on Wednesday, July 10, 1946, *before* Mr. Berner filed his petition, his brother-in-law purchased 20,000 shares of the debtor in the market. Later in the day, after Mr. Berner had filed his petition, the market advanced considerably. Mr. Berner has admitted these facts (R. 81).

selling on July 12, 1946 for $13 a share—about twice their sound economic value as fixed in the reorganization proceeding by the application of reorganization standards of valuation, based on prospective earnings. They argued that stockholders should be given an opportunity to realize this speculative market price.

The position of petitioners disregards the volatile and ephemeral nature of prices established in this manner, assumes that inflated and unjustified prices established in a thin market by the purchase and sale of a few shares will prevail when over 1,000,000 shares are issued and become the subject of trade, and assumes that the July 12, 1946 unnatural prices will still prevail after expiration of the time which must necessarily elapse before a new plan could be consummated.

The absolute unreliability of market prices (especially "when issued" prices) is clearly demonstrated by the fact that these shares recently have fallen, and are now close to the sound economic value which was fixed in the reorganization proceeding and which was used in the allotment of the new shares to creditors and stockholders under the confirmed plan; thus demonstrating again the wisdom of the rule that only sound economic values based on prospective profits are to be used to determine the rights of creditors and stockholders in reorganization. If the present market trend continues, these shares may soon be quoted in the "when issued" market at considerably less than their reorganization value, although there has been no change in the economic value of the debtor's office building (its sole asset, except cash) or in the debtor's prospective net earnings.

A reopening of the proceedings and a setting aside of the confirmed plan would also do grave and irreparable damage to many persons who purchased securities in reliance upon the order of confirmation. Some appeared at the hearing before the District Court to object to the

grant of the relief requested in the petitions (R. 75-79.) The District Judge referred to this in his Memorandum Opinion (R. 99).

A substitution of the proposed new plan for the confirmed plan would produce other results:

Most trustees of testamentary and *inter vivos* trusts have no power to retain shares of stock as trust investments. It is, therefore, common practice in reorganization situations, after the rights of holders of bonds have been fixed by an order of confirmation, for trustees to anticipate the future delivery of the new securities allotted to them under the plan and to sell immediately, on a "when issued" basis, the equity stocks which the law does not permit them to retain. Conservative investors also frequently do this. The extent to which this was done by holders of the debentures of this debtor is not known, but if the proposed modified plan should be adopted it is probable that many owners of debentures who sold their new common stock on a "when issued" basis will suffer loss by being compelled to cover in the open market.

Even if the proposed new plan had been fair and equitable and feasible—which it is not—and had been proposed early enough in the proceeding to warrant its consideration, the Court would have been under no obligation to approve it, rather than the confirmed plan, since the confirmed plan is concededly fair and equitable, and feasible. "The district court was not called on to say that the plan was the best or fairest that could be drafted." *In re Radio Keith Orpheum Corp.*, 106 F.(2d) 22, 26, (1939) *cert. den.* 308 U.S. 622; *In re Lower Broadway Properties*, 58 F. Supp. 615, 618 (S.D.N.Y. 1945).

None of the facts in the petitions were denied; there was therefore no necessity for taking further testimony. *Country Life Apts.* v. *Buckley, supra*, 145 F.(2d) 935, 937 (C.C.A. 2d, 1944).

Where in the light of the entire record it appears that the Court has given consideration to the issues involved and that the parties have been adequately represented, the action of the lower court will not be reviewed upon the ground of an alleged failure to exercise its discretion. See *Allen Calculators, Inc.* v. *Nat. Cash Register Co.*, 322 U.S. 137, 142 (1944).

POINT VI

The questions involved herein are not of such importance as to make it desirable that the writs be granted.

On the applications for writs to review the order of the Circuit Court of Appeals refusing a "stay", the ordinary jurisdiction of this Court is invoked. However, only a question of fact is involved: was the Circuit Court justified in refusing a stay under the circumstances of this case?

As to the applications for writs to review the orders of the *District Court,* reference is respectfully made to the discussion of the jurisdiction of this Court in bankruptcy proceedings hereinbefore set forth. (See "Jurisdictional Question Presented", *supra,* p. 3.)

Even if this Court has power, a direct review by it of judgments or orders of the District Court is only granted in exceptional cases where questions of public importance are involved or where the question is of such a nature that it is peculiarly appropriate that such action by this Court should be taken. *Ex Parte United States,* 287 U.S. 241 (1932); *Ex Parte Republic of Peru,* 318 U.S. 578 (1943); see also 28 U.S.C. Sec. 345.

No constitutional question is here involved, as in *Carter* v. *Carter Coal Co.,* 298 U.S. 238, 285 (1936); *Norman* v. *B. & O. R. R. Co.,* 294 U.S. 240, 249-5 (1935); *Railroad Re-*

tirement Board v. *Alton R. Co.*, 295 U.S. 330, 344 (1935). Nor is there any compelling reason shown why the usual procedure of appeal to, and determination by, the Circuit Court of Appeals is not wholly adequate and should not be followed.

There is no conflict among the decisions. The assertion in the Stockholders' Committee's brief (p.15) that *In Re 1934 Realty Co.*, 159 F.(2d) 477 (C.C.A. 2d, 1945), is in conflict with *Country Life Apts.* v. *Buckley, supra*, is unwarranted. The *Country Life* case holds that no *new plan* may be substituted for a confirmed or approved plan; the *1934 Realty* case approved a *modification* of a confirmed plan because the lower court had made a mistake of law in not subordinating one claim to the claims of other creditors.

POINT VII

Errors in Petitions.

In the petition in No. 609 (pp. 7, 8), it is stated that stockholders "might well realize through the sale of rights up to $50 for each share owned by them". This statement is clearly in error.

The most that is alleged by petitioners is that the new shares had a top value on July 12, 1946, of $13 per share. As each stockholder will have a right to get *one* new share for each old share upon payment of $6, the maximum value of the right would be $7 for each share and *not* $50 for each share owned by them.

In the petition in No. 610, a similar gross exaggeration occurs. It is stated (p. 7) that "for each increase of $1,000,000 in value of the real estate over that of $21,750,000 found by the Court, for the purpose of the plan, stockholders' rights under the City Investing offer would be

worth about $10 per stockholder's share". Under the proposed new plan, as well as under the confirmed plan, an issue of 1,017,993 shares of stock would be outstanding. Each $1,000,000 increase in value will therefore have a worth of *less* than $1 per stockholder's share instead of "$10 per stockholder's share".

It was statements similiar to the foregoing which led Mr. Justice Reed to assume in his opinion (R. 368): "If the stockholders' estimate of present value is correct, there is an advantage of some two to five dollars to each subscription warrant or from $20 to $50 per stockholder share under the new proposal".

As each stockholder is offered a warrant to purchase only one new share for each old share held, it is clear that the figures should be $2 to $5 per stockholder share instead of "$20 to $50 per stockholder share".

Mr. Justice Reed made his statement with a view to market conditions as of July 1946 when the "when issued" price was $13. It is very doubtful whether the rights would have any value under present market conditions.

POINT VIII

The so-called underwriting commitment has expired and has not been renewed.

The so-called commitment of the City Investing Company expired October 15, 1946. It has not been renewed.

Respondents contend that the commitment never had substance because the underwriter deliberately imposed conditions which it knew could not be met. The need for a binding commitment under which the underwriter could be held, regardless of changes in market conditions, has been demonstrated by recent events:

The stock market was at its high in July, when these applications were made. Speculation was rife. The new shares of the debtor, which had a concededly sound economic value of only approximately $6 per share, were priced at $13 a share in a thin and highly speculative "over-the-counter" market on a "when issued" basis. At that time, desiring to avail itself of this market, a real estate operator and speculator was willing to offer, for an exorbitant consideration, to purchase the shares for $6 a share. It refused, however, to bind itself for more than 90 days, and conditioned its obligation upon a termination of all legal proceedings, *including appeals*, and a delivery of the shares to it, before the expiration of the 90-day period. It knew the conditions could not be met within the time fixed. It was so informed by the Court, the Securities and Exchange Commission, and the interested parties. Nevertheless it refused to extend its offer for a longer period. (R. 66, 67.)

Now,—the period of the offer has expired, the speculative market of the shares has dropped, and the underwriter has refused to renew even its old offer with its impossible conditions.

All that remains is a hope on the part of the petitioners that they *may* be able to obtain a new commitment either from the City Investing Company or from some other source if the cases should be remanded to the District Court. They are in effect requesting the appellate courts to render a declaratory judgment on purely hypothetical questions. Such a request would not be appropriate even if made at an early stage of the proceedings, and certainly not after a plan has been confirmed and largely consummated. A purely hypothetical controversy certainly should not be entertained at this stage of the reorganization proceedings. The mere fact that a purported commitment, which in practical effect was illusory, existed

at one time in the past, **does not** give substance or vitality to the appeals.

We, therefore, pray that the several petitions for certiorari be dismissed, or if not dismissed, denied.

Respectfully submitted,

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Respondents.

New York, N. Y.
November 8, 1946.

APPENDIX

Sections of Bankruptcy Act

CHAPTER IV—COURTS AND PROCEDURE THEREIN

Sec. 24(c) *Jurisdiction of Appellate Courts.* The Supreme Court of the United States is hereby vested with jurisdiction to review judgments, decrees, and orders of the Circuit Courts of Appeals of the United States and the United States Circuit Court of Appeals of the District of Columbia in proceedings under this Act in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted.

CHAPTER X, ARTICLE III—JURISDICTION AND POWERS OF COURT

Sec. 121. Where not inconsistent with the provisions of this chapter, the jurisdiction of appellate courts shall be the same as in a bankruptcy proceeding.

CHAPTER X, ARTICLE IV—PETITION

Sec. 128. If no bankruptcy proceeding is pending, an original petition may be filed with the court in whose territorial jurisdiction the corporation has had its principal place of business or its principal assets for the preceding six months or for a longer portion of the preceding six months than in any other jurisdiction.

CHAPTER X, ARTICLE IX—CREDITORS AND STOCKHOLDERS

Sec. 221. The judge shall confirm a plan if satisfied that—

(1) the provisions of article VII, section 199, and article X of this chapter have been complied with;

(2) the plan is fair and equitable, and feasible;

(3) the proposal of the plan and its acceptance are in good faith and have not been made or procured by means or promises forbidden by this Act;

(4) all payments made or promised by the debtor or by a corporation issuing securities or acquiring property under the plan or by any other person, for services and for costs and expenses in, or in connection with, the proceeding or in connection with the plan and incident to the reorganization, have been fully disclosed to the judge and are reasonable or, if to be fixed after confirmation of the plan, will be subject to the approval of the judge; and

(5) the identity, qualifications, and affiliations of the persons who are to be directors or officers, or voting trustees, if any, upon the consummation of the plan, have been fully disclosed, and that the appointment of such persons to such offices, or their continuance therein, is equitable, compatible with the interests of the creditors and stockholders and consistent with public policy.

Sec. 222. A plan may be altered or modified, with the approval of the judge, after its submission for acceptance and before or after its confirmation if, in the opinion of the judge, the alteration or modification does not materially and adversely affect the interests of creditors or stockholders. If the judge finds that the proposed alteration or modification, filed with his approval, does materially and adversely affect the interests of creditors or stockholders, he shall fix a hearing for the consideration, and a subsequent time for the acceptance or rejection, of such alteration or modification. The requirements in regard to notice of hearing, to submission to the Securities and Exchange Commission, to acceptance, to filing and hearing

of objections to confirmation and to the confirmation, as prescribed in article VII of this chapter in regard to the plan proposed to be altered or modified, shall be complied with.

Sec. 223. Any creditor or stockholder who has previously accepted the plan proposed to be altered or modified and who does not file a written rejection of the proposed alteration or modification within the time fixed by the judge, shall be deemed to have accepted the alteration or modification and the plan so altered or modified unless the previous acceptance provides otherwise.

Sec. 224. Upon confirmation of a plan—

(1) the plan and its provisions shall be binding upon the debtor, upon every other corporation issuing securities or acquiring property under the plan, and upon all creditors and stockholders, whether or not such creditors and stockholders are affected by the plan or have accepted it or have filed proofs of their claims or interests and whether or not their claims or interests have been scheduled or allowed or are allowable;

(2) the debtor and every other corporation organized or to be organized for the purpose of carrying out the plan shall comply with the provisions of the plan and with all orders of the court relative thereto and shall take all action necessary to carry out the plan, including, in the case of a public-utility corporation, the procuring of authorization, approval, or consent of each commission having regulatory jurisdiction over the debtor or such other corporation;

(3) if the judge shall so direct, there shall be deposited and distributed, in such manner as the judge may direct, the moneys for all payments which by the provisions of the plan or under this chapter are required to be made in cash; and

(4) distribution shall be made, in accordance with the provisions of the plan, to creditors and stockholders (a) proofs of whose claims or stock have been filed prior to the date fixed by the judge and are allowed, or (b) if not so filed, whose claims or stock have been listed by the trustee or scheduled by the debtor in possession as fixed claims or stock, liquidated in amount and not disputed.

Sec. 225. Where the claims or stock specified in paragraph (4), clause (b), of section 224 of this Act are objected to by any party in interest, the objection shall be heard and summarily determined by the Court.

Sec. 226. The property dealt with by the plan, when transferred by the trustee to the debtor or other corporation or corporations provided for by the plan, or when transferred by the debtor in possession to such other corporation or corporations, or when retained by the debtor in possession, as the case may be, shall be free and clear of all claims and interests of the debtor, creditors, and stockholders, except such claims and interests as may otherwise be provided for in the plan or in the order confirming the plan or in the order directing or authorizing the transfer or retention of such property.

Sec. 227. The court may direct the debtor, its trustee, any mortgagees, indenture trustees, and other necessary parties to execute and deliver or to join in the execution and delivery of such instruments as may be requisite to effect a retention or transfer of property dealt with by a plan which has been confirmed, and to perform such other acts, including the satisfaction of liens, as the court may deem necessary for the consummation of the plan.

Sec. 228. Upon the consummation of the plan, the judge shall enter a final decree—

(1) discharging the debtor from all its debts and lia-

bilities and terminating all rights and interests of stockholders of the debtor, except as provided in the plan or in the order confirming the plan or in the order directing or authorizing the transfer or retention of property;

(2) discharging the trustee, if any;

(3) making such provisions by way of injunction or otherwise as may be equitable; and

(4) closing the estate.

CHAPTER X, ARTICLE XII—DISMISSALS AND ADJUDICATIONS

Sec. 236. If no plan is proposed within the time fixed or extended by the judge, or if no plan proposed is approved by the judge and no further time is granted for the proposal of a plan, or if no plan approved by the judge is accepted within the time fixed or extended by the judge, or if confirmation of the plan is refused, or if a confirmed plan is not consummated, the judge shall—

* * * * *

(2) where the petition was filed under section 128 of this Act, after hearing upon notice to the debtor, stockholders, creditors, indenture trustees, and such other persons as the judge may designate, enter an order either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this Act, or dismissing the proceeding under this chapter, as in the opinion of the judge may be in the interests of the creditors and stockholders.

Federal Rules of Civil Procedure

Rule 60. Relief from Judgment or Order.

* * * * *

(b) MISTAKE; INADVERTENCE; SURPRISE; EXCUSABLE NEGLECT. On motion the court, upon such terms as are just,

may relieve a party or his legal representative from a judgment, order, or proceeding taken against him through his mistake, inadvertence, surprise, or excusable neglect. The motion shall be made within a reasonable time, but in no case exceeding six months after such judgment, order, or proceeding was taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court (1) to entertain an action to relieve a party from a judgment, order, or proceeding, or (2) to set aside within one year, as provided in Section 57 of the Judicial Code, U.S.C., Title 28, §118, a judgment obtained against a defendant not actually personally notified.